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Letter dated 11 March 2005 from the Secretary-General addressed to the President of the Security Council

I have the honour to submit for the consideration of the members of the Security Council the report of the assessment mission I dispatched at their request to Burundi (see S/2004/72), with the objective of considering the advisability and feasibility of establishing an international judicial commission of inquiry, as provided for in the Arusha Peace and Reconciliation Agreement of 28 August 2000. The assessment mission visited Burundi in May 2004. Its report, however, takes account of facts and events which postdated its visit, to the extent of their relevancy to its final recommendations.

Given a mandate to consider the advisability and feasibility of establishing an international judicial commission of inquiry for Burundi, the mission is convinced of the necessity of establishing a commission, though not necessarily in the shape and form requested by the Government of Burundi. In considering the modalities for establishing an accountability mechanism to clarify the truth, investigate the crimes and identify and bring to justice those responsible for the crimes of genocide, crimes against humanity and war crimes committed in Burundi since its independence, the mission took into account the Arusha Agreement, the needs and expectations of the Burundians, the capacity of the Burundian administration of justice, established United Nations principles and practices, and the practicality and feasibility of any proposed mechanism. It accordingly recommends the establishment of a twin mechanism: a non-judicial accountability mechanism in the form of a truth commission, and a judicial accountability mechanism in the form of a special chamber within the court system of Burundi.

To avoid the establishment and operation of two virtually identical commissions — a national truth and reconciliation commission and an international judicial commission — the mission recommends a single, national truth commission based on the recently promulgated Law on the National Truth and Reconciliation Commission as amended, with a mixed composition of both national and international components. A truth commission with a substantial international component would enhance the objectivity, impartiality and credibility of the commission, and at the same time provide a sense of national "ownership" through participation of Burundians in the process of clarifying the historical truth and pursuing national reconciliation. In recommending a special chamber within the court system of Burundi, the mission opted for a judicial mechanism located in the country and forming part of the Burundian legal system (a "court within a court") with a view to strengthening the judicial sector in material and human resources,

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and leaving behind a legacy of international standards of justice, and trained judges, prosecutors, defence counsel and experienced court managers.

The Council will recall that three United Nations commissions of inquiry have been established in the last decade at the request of the Government of Burundi. Each had a limited mandate to investigate the assassination of the President of Burundi on 21 October 1993 and the massacres that followed. No legal or practical effect, however, has been given to any of their recommendations, and no action has been taken by any of the United Nations organs. In calling upon the Security Council to act, the mission concludes that the "United Nations can no longer engage in establishing commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law". I fully concur with this conclusion.

In considering the recommendation of the mission to establish a twin accountability mechanism, members of the Security Council should take fully into account the financial costs involved, and the need to provide a viable funding mechanism to ensure a continuous and sustained source of funding for the duration of their operation.

If the Council approves the report and instructs me to negotiate its practical implementation, it would be my intention to initiate an all-inclusive process of negotiation with the Government of Burundi in consultation with a range of national actors and civil society, to ensure that, in the establishment of judicial and non-judicial accountability mechanisms for Burundi, the views and wishes of the people of Burundi are taken into account.

(*Signed*) Kofi A. **Annan**

Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi

I. Introduction

1. In his letter of 24 July 2002 addressed to the Secretary-General, the then President of Burundi, Pierre Buyoya, requested that an international judicial commission of inquiry for Burundi, as provided for in the Arusha Peace and Reconciliation Agreement of 28 August 2000 be established by the United Nations. Pursuant to that request, the President of the Security Council requested the Secretary-General on 26 January 2004 to dispatch an assessment mission to Burundi with the objective of considering the advisability and feasibility of establishing such an international commission (see S/2004/72).

2. The terms of reference of the assessment mission were approved by the Security Council (see S/2004/72) and are annexed to this report. The mission was accordingly given the following tasks:

(a) To specify the modalities and options for the establishment of an international commission of inquiry in reference to the Arusha Agreement, and consider approaches which support the peace process and foster "truth and reconciliation while achieving justice";

To that end the mission was required:

(i) To assess the progress made towards the implementation of the judicial reforms provided for in the Arusha Agreement and the capacity of the Burundian judicial system, including its powers of investigation, to bring criminals to trial in an impartial and effective manner;

(ii) To recommend structures within the international commission, which would have a beneficial impact on the Burundian legal system;

(iii) To assess the progress made towards the establishment of the national truth and reconciliation commission, and the implications of the law on provisional immunity for political leaders returning from exile;

(b) To assess the added value of an international commission of inquiry in the light of the reports submitted by previous commissions of inquiry, notably the 1985 Whitaker report, the 1994 report of non-governmental organizations, the 1994-1995 Aké-Huslid report and the 1996 report of the international commission of inquiry;

(c) To determine the possible division of powers and competences between the national truth and reconciliation commission and the international commission of inquiry, inter alia, with regard to their complementary investigatory responsibilities, the status of individuals to be investigated and the question of amnesty;

(d) In devising the modalities for the establishment of an international commission of inquiry, the mission was required:

(i) To examine the possibility of limiting the temporal jurisdiction of the commission;

(ii) To assess the capacity of the Government to guarantee the security of the members of the commission and facilitate their investigations;

(iii) To evaluate the necessary logistical, human and financial resources of the commission;

(iv) To state the expectations of the Burundian authorities regarding the conclusions of the inquiry and their practical implementation, with regard in particular to possible prosecutions before an international or a national jurisdiction.

3. The assessment mission visited Burundi from 16 to 24 May 2004. It was led by Tuliameni Kalomoh, Assistant Secretary-General for Political Affairs, and included representatives of the Department of Political Affairs, the Office of Legal Affairs, the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, and the Office of the United Nations Security Coordinator. The mission also benefited from the valuable assistance of the representatives of the United Nations Office in Burundi (UNOB) who accompanied the mission for its duration in Burundi.

4. The mission held extensive consultations with representatives of the Government and local authorities, political parties, judicial authorities, religious leaders and civil society. On its way to Burundi, the mission met with the Deputy President of South Africa, Jacob Zuma, the Facilitator of the Burundi peace process. While in Burundi, it met with the President of Burundi, Domitien Ndayizeye, the Vice-President, Alphonse Marie Kadege, the Minister for Good Governance and General Inspection, the President of the National Assembly and the President of the Senate, the Minister of Justice, the Minister of Public Security, the Minister of the Interior, the Minister of Human Rights, Institutional Reforms and Relations with the Parliament, the Minister of External Affairs and Cooperation, and the President of the Government Commission on Human Rights. The mission also held consultations with two former Presidents of Burundi, Sylvestre Ntibantunganya and Jean-Baptiste Bagaza, the leaders of the political parties and military political movements, representatives of the Muslim community in Burundi and, upon its return to New York, with representatives of the Episcopal Conference. The mission also met with the United Nations country team, the Special Representative of the President of the Commission of the African Union, members of the Implementation Monitoring Committee and the diplomatic corps, national and international non-governmental organizations, a group of returnees and individual experts (law professors, defence lawyers and historians).

5. The mission visited the premises of the various courts and met with the judicial authorities and members of the legal profession, notably the Prosecutor General, the Vice-President and judges of the Supreme Court, members of the Constitutional Court, the Court of Appeals and the High Court (*Tribunal de grande instance*). It also met with the President of the Military Tribunal, the Director of the Investigative Police, members of the Bar Association and the prison authorities in the Central Prison of Mpimba. In addition to Bujumbura, the mission visited the town of Gitega, where it met with the Governor and the Military Commander of the region of Gitega, visited the *Tribunal de grande instance* and met with the President of the Court and the Prosecutor General.

6. The report of the mission includes facts and events which occurred in the period between the visit of the assessment mission and the submission of its report. They were taken into account in the reformulation of some of its recommendations to adapt them to the changing realities in Burundi. The political context set out below reflects, however, the situation at the time of the mission's visit; political developments since then have been covered in subsequent reports of the Secretary-General on the United Nations Operation in Burundi.

II. The political context and the expectations of the Burundians

7. At the time of the mission's visit, the implementation of the Global Ceasefire Agreement signed on 16 November 2003 between the Transitional Government and CNDD-FDD (Nkurunziza) had experienced some delays. Despite efforts made to encourage FNL (Rwasa), the only armed movement outside the peace process, FNL refused to enter into serious negotiations with the Transitional Government.

8. The visit of the mission took place five months before the end of the transition period and the elections scheduled for 31 October 2004. Maintaining the timetable for the elections was, in the view of many of its interlocutors, the most immediate challenge. Under the Arusha Agreement, the transitional period was to end with the holding of local, parliamentary and presidential elections. The mission was informed that, in spite of the very limited time remaining, little progress had been made with regard to the electoral process since the latest report of the Secretary-General (S/2004/210). None of the key electoral laws (post-transition constitution, electoral code, law on political parties and law on the communal administration) had been adopted, and no preparatory activities, including a civic education campaign, the registration of voters and the establishment of an Independent Electoral Commission, had yet begun.

9. The mission noted that the time frame for the holding of the elections had become a serious bone of contention among the Burundian political actors. While FRODEBU (Front pour la démocratie au Burundi) and all the other members of the G-7 political parties (Hutu) as well as CNDD-FDD (Nkurunzina) demanded that the schedule for elections be respected, the G-10 political parties (Tutsi) raised numerous conditions which should be fulfilled before elections were held. Many of the mission's interlocutors expressed concerns at the fact that, if the current deadlock continued and no elections were held before the deadline, all the existing institutions would lose their legitimacy, which would create a serious constitutional impasse. Some believed, however, that elections would not be free and fair unless the question of impunity was addressed, while others were of the view that it should await the elections.

10. Some political parties stressed that a number of issues of critical importance needed to be dealt with in order to hold credible and fair elections in a secure environment. Disarmament, demobilization of former combatants as well as security sector reform were among those mentioned.

11. The dispatch of the mission was warmly welcomed by all interlocutors although many of them regretted the Council's delay in responding to the request and stressed that instead of examining the advisability of establishing the commission, the mission should rather consider its feasibility or the technical modalities for its establishment. All its interlocutors, including the Facilitator,

unanimously stressed the urgent need for setting up the commission. They noted that only a commission made up of international experts would be able to clarify the *contentieux de sang* between Burundians which has been the root cause of the conflict. The mission's interlocutors assured it that the commission would receive full support in carrying out its tasks and that its conclusions would be accepted by all because of its independence and impartiality. They also expressed the view that the commission's temporal competence should remain as agreed in the Arusha Agreement (1962 to 2000) while acknowledging that some periods (1965, 1972, 1988 and 1993) had been marked by more intense crimes than others. The main issue of disagreement among the Burundians concerned the timing for the establishment of the commission. While some political parties (mainly Tutsis) strongly believed that the establishment of the commission should be a prerequisite to the holding of the elections, others (FRODEBU and Nkurunziza) considered that the elections should be held on schedule and warned that such a commission would lead to further political instability.

12. In an ethnically divided society, where little agreement exists on any of the issues relating to the major events in Burundi since its independence in 1962, there was unanimous support for the establishment of an international judicial commission of inquiry to clarify the truth, investigate the crimes and, should it classify the crimes as genocide, war crimes and other crimes against humanity, serve also as a trigger mechanism for the establishment of an international criminal tribunal.

13. In the margin of its consultations, the mission met with one of the authors of the UNESCO-led project "Writing the history of Burundi". The project originated in the 1997 Conference on the History of Burundi convened by UNESCO with the participation of some 30 Burundian experts of different political tendencies, and chaired jointly by the current President of Mali, Amadou Toumani Touré, and the current Special Adviser to the Secretary-General on Africa, Mohamed Sahnoun. Conceived in the spirit of the Arusha Agreement,[1] the project was designed to establish an official, scientific and agreed account of the history of Burundi from its origin until 2000. It was divided by periods among some 50 authors, both Burundians and foreigners, experts in history, geography, linguistics and anthropology. The project was sponsored by UNESCO and the Agence intergouvernementale de la Francophonie; it was assisted by UNDP and UNOB with the cooperation of the Government of Burundi, and was funded through voluntary contributions. Premised on the assumption that a common and better understanding of the history of Burundi would contribute to peace and national reconciliation, the project's main objective was to serve as an educational tool in primary and secondary schools and a history manual for the public at large.

14. In their quest for the truth, the Burundians expressed expectations not only for a full and truthful account of their history since independence, from a credible, independent and impartial international authority, but also and more importantly,

[1] Article 8 of protocol I of the Arusha Agreement sets out the principles and measures relating to national reconciliation. Paragraph 1 (c) thereof provides as follows:

> The [National Truth and Reconciliation] Commission shall also be responsible for clarifying the entire history of Burundi, going as far back as possible in order to inform Burundians about their past. *The purpose of this clarification exercise shall be to rewrite Burundi's history so that all Burundians can interpret it in the same way.* (emphasis added)

perhaps, for the eradication of impunity and the holding to account of those responsible for the crimes committed. Truth and justice, in their vision, were inextricably linked. Combined, they were also indispensable for national reconciliation.

III. The nature and added value of an international judicial commission of inquiry

15. The Arusha Agreement envisaged the establishment by the United Nations of an international judicial commission of inquiry on genocide, war crimes and crimes against humanity, and entrusted it with the following mandate:

(a) To investigate and establish the facts relating to the period from independence to the date of signature of the Agreement;

(b) To classify them;

(c) To determine those responsible;

(d) To submit its report to the Security Council;

(e) To make use of all the reports that already exist on this subject, including the 1985 Whitaker report, the 1994 non-governmental organizations' report, the 1994-1995 report by Ambassadors Aké and Huslid and the 1996 report of the international commission of inquiry. (protocol I, art. 6, para. 10)

16. With a mandate to clarify the truth, classify the crimes and identify those responsible, the proposed commission had the characteristics of both a truth-telling mechanism and a judicial or quasi-judicial accountability mechanism.

17. If established, the international commission of inquiry would be the latest in a series of international missions and commissions of inquiry established in the last decade for Burundi at the request of the Government and pursuant to a Security Council mandate. Its added value, therefore, should be examined in the light of the results achieved by the commissions that preceded it, their usefulness and impact on the Burundian society.

18. Three international commissions for Burundi have previously been established by the United Nations: the preparatory fact-finding mission to Burundi led by Ambassadors Martin Huslid and Simeon Aké in 1994,[2] the Special Envoy appointed to examine the feasibility of establishing either a commission on the truth or a judicial fact-finding commission in Burundi in 1995,[3] and the international commission of inquiry concerning the assassination of the President of Burundi and

[2] Pursuant to a note by the President of the Security Council (S/26757) and the request of the Government of Burundi, the Secretary-General decided to send a preparatory fact-finding mission to Burundi with the mandate to investigate the coup d'état and the massacres of October 1993. The report of the fact-finding mission was submitted to the Secretary-General on 20 May 1994 (the Aké-Huslid report: S/1995/157 of 24 February 1995).

[3] Pursuant to the statement of the President of the Security Council (S/PRST/1995/13) proposing the establishment of an international commission of inquiry in Burundi, the Secretary-General entrusted his Special Envoy, Pedro Nikken, with the task of investigating the possibility of establishing a commission on the truth to address the problem of impunity in Burundi. The Nikken report is contained in document S/1995/631 of 28 July 1995.

the massacres that followed in 1995.[4] The fourth commission, the international commission of inquiry into human rights violations in Burundi since 21 October 1993, was a non-governmental organization-based commission composed of 13 human rights experts, and set up at the request of the Burundian Human Rights League ITEKA.[5]

19. While different in some respects, the four commissions share the following common features:

(a) Their subject-matter and temporal jurisdiction was limited to the events of 1993, namely, the coup d'état and assassination of President Ndadaye, and the massacres that followed — events which were only the latest in the bloody cycles of violence which had shattered Burundi in its four decades of ethnic conflict.

(b) While cursory references were made in some reports, notably the Whitaker and Aké-Huslid reports, to the 1972 genocide of Hutus,[6] a legal determination that the crime of genocide had been committed in Burundi was made only in respect of the 1993 massacres of Tutsis.[7]

(c) All four commissions recognized that an inquiry into the historic truth without a measure of accountability would not suffice to eradicate impunity. In the words of the Special Envoy, Pedro Nikken:

> An objectively established "truth" that does not give rise to consequences or hope would be extremely dangerous in the country's current situation, since it would encourage the sense of impunity of those who escape justice, thereby inducing them, in a way, to repeat their crimes. (S/1995/631, para. 18)

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[4] In its resolution 1012 (1995) of 28 August 1995, the Security Council requested the Secretary-General to establish an international commission of inquiry with the following mandate: (a) to establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres and other related serious acts of violence which followed; (b) to recommend measures of a legal, political and administrative nature, as appropriate, after consultation with the Government of Burundi, and measures with regard to the bringing to justice of persons responsible for those acts, to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity and promote national reconciliation in Burundi. The commission's report is contained in document S/1996/682 of 22 August 1996.

[5] Commission internationale d'enquête sur les violations des droits de l'homme au Burundi depuis le 21 octobre 1993: rapport final (5 juillet 1994).

[6] The Whitaker report was a thematic report on the question of the prevention and punishment of the crime of genocide (E/CN.4/Sub.2/1985/6 of 2 July 1985). Among other examples of genocide committed in the twentieth century, it cites the "Tutsi massacre of Hutu in Burundi in 1965 and 1972", where the "Tutsi minority government first liquidated the Hutu leadership in 1965, and then slaughtered between 100,000 and 300,000 Hutu in 1972" (para. 24, n. 15). The 1972 massacre of the Hutu was also cited as an example of genocide committed against a protected group constituting the majority in the country (para. 30). The Aké-Huslid report referred to the "genocidal repression" of Hutus, where the elite, the leaders and future professional staff were particularly targeted (para. 36).

[7] The 1995 international commission of inquiry concluded:

> The Commission considers that evidence is sufficient to establish that acts of genocide against the Tutsi minority took place in Burundi on 21 October 1993, and the days following, at the instigation and with the participation of certain Hutu FRODEBU functionaries and leaders up to commune level.
>
> The Commission considers that the evidence is insufficient to determine whether or not those acts of genocide were planned or ordered by leaders at a higher level. (S/1996/682, paras. 483 and 484)

(d) Finally, no legal or practical effect was given to any of their recommendations and no action was taken by any of the United Nations organs, including the one which requested their establishment.

20. In a society deeply divided along ethnic lines, where the inter-ethnic killings in 1965, 1972, 1988, 1991 and 1993 form part of the same whole, limiting the mandate of any inquiry to a single cycle of massacres and, worse still, characterizing them, and them alone, as genocide, was considered by many in Burundi as a partial and biased account of the events, and one oblivious to the suffering of an entire ethnic group, by far the largest. In a society where "genocide" is not only a legal characterization of a crime but a political statement[8] and global attribution of guilt to an entire ethnic group, the 1996 report had a divisive effect on Burundian society and contributed to the perception of a biased international community. The call for the establishment of a commission of inquiry whose temporal jurisdiction extends over four decades of Burundi recent history is thus an appeal for fairness in recounting the historical truth and putting the 1993 massacres in historical perspective. It was also a plea for recognition that members of all ethnic groups were at different times both victims and perpetrators of the same crimes.

21. The mission took pains to explain to its various interlocutors that, even if established to investigate four decades of cyclical conflict, a judicial determination by the commission that genocide had been committed in Burundi by and against all ethnic groups can by no means be presumed. Many of its interlocutors, however, remained unconvinced.

IV. Possible limitations on the temporal jurisdiction of the commission

22. In accordance with its mandate, the mission examined the possibility of more effectively limiting the temporal competence of the commission to specific events or periods. With few exceptions, such as Accord Cadre, a political group predominantly Tutsi, the leaders of all political parties and civil society across the ethnic divide were of the opinion that the temporal jurisdiction of the commission should not be limited, although in its investigations it should focus on specific events, notably the massacres of 1965, 1972, 1988, 1991 and 1993. As for the end date of the commission's jurisdiction, many of them expressed the view that it should be set at the time of its establishment, and in any event beyond 2000, to include the massacres perpetrated after the signature of the Arusha Agreement, notably the massacre on 9 September 2002 of 183 civilians in Itaba, Gitega Province.

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[8] The Agreement embodying the Convention on Governance concluded in 1994 between the forces for democratic change (majority parties) and the political parties of the opposition on power-sharing provides in article 36, in its relevant part, as follows:

> It is requested that an international judicial fact-finding mission be formed; ... it shall be composed of competent and impartial persons to investigate the coup d'état of 21 October 1993 and *what the political partners have agreed to call genocide* without prejudice to the outcome of the independent national and international investigations ... (emphasis added) (A/50/94-S/1995/190, annex)

Similarly, the Arusha Agreement provides, in article 3 of protocol I, as follows:

> ... without prejudice to the results and conclusions of the International Judicial Commission of Inquiry and National Truth and Reconciliation Commission ... *the Parties recognize* that acts of genocide, war crimes and other crimes against humanity have been perpetrated since independence against Tutsi and Hutu ethnic communities in Burundi. (emphasis added)

23. The mission is convinced that, if the international commission is to have any added value, its temporal jurisdiction must extend beyond the events of 1993, to include the entire period since independence.[9] It is at the same time convinced that, if the commission is to have a temporal jurisdiction spanning more than four decades, its nature as a judicial commission of inquiry must change. A judicial commission of inquiry which would conduct in-depth criminal investigations into the individual criminal responsibility of those presumed responsible for the massacres committed since 1962, throughout the country and in the absence of a prosecutorial strategy to guide the investigation, would be lengthy, costly and heavily burdened. What is more, there is no guarantee that the evidentiary value of its findings would be acceptable in a court, whether national or international. In the United Nations practice of establishing commissions of inquiry and other judicial accountability mechanisms, practical considerations have dictated a temporal jurisdiction limited to an event, a conflict or a period of relatively short duration. In the case of United Nations-assisted truth and reconciliation commissions, however, an extended temporal jurisdiction has been a common feature.[10]

24. If the international judicial commission is to shift its nature to a truth-telling mechanism, its relationship with the national truth and reconciliation commission envisaged under the Arusha Agreement and the law on the establishment of a truth and reconciliation commission would have to be re-evaluated.

V. The national truth and reconciliation commission and its relationship to the international judicial commission of inquiry

25. The national truth and reconciliation commission envisaged in the Arusha Agreement was entrusted with the functions of investigation, arbitration and reconciliation, and clarification of history. Its powers of investigation under article 8 of protocol I of the Arusha Agreement were described in terms almost identical to those of the international judicial commission. They provided:

> The Commission shall bring to light and establish the truth regarding the serious acts of violence committed during the cyclical conflicts which cast a tragic shadow over Burundi from independence (1 July 1962) to the date of signature of the Agreement, classify the crimes and establish the

[9] The need to examine the Burundi ethnic conflict in its historical perspective was stressed by the 1995 commission of inquiry, which recommended:

> If it is decided to assert international jurisdiction regarding acts of genocide in Burundi — the investigation should not be limited to acts committed in October 1993, but should also extend to other acts committed in the past, in order to determine whether they also constituted acts of genocide and, if such is found to be the case, to identify those responsible and bring them to justice. Particular attention should be given to the events that took place in 1972 when, according to all reports, a systematic effort was made to exterminate all educated Hutus. No one was ever prosecuted for these acts. (S/1996/682, para. 498)

[10] In the case of Sierra Leone, the temporal jurisdiction of the Truth and Reconciliation Commission extended from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement in 1999 (*The Truth and Reconciliation Commission Act, 2000* (art. 6, para. 1)). In the case of Timor-Leste, the Commission on Reception, Truth and Reconciliation was competent to consider human rights violations and other criminal acts committed in the period from 25 April 1974 to 25 October 1999 (Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (sects. 13.2 and 22.1)).

responsibilities, as well as the identity of the perpetrators and the victims. However, the Commission shall not be competent to classify acts of genocide, crimes against humanity and war crimes.

26. The Law on the Composition, Organization and Functions of the National Truth and Reconciliation Commission was promulgated on 27 December 2004 to give effect to the provisions of the protocol in the Burundian legal system. Under the Law, the commission was mandated to establish the truth on acts of violence committed in the course of the conflict since 1 July 1962, qualify the crimes, other than genocide, crimes against humanity and war crimes, establish the responsibilities, and identify both perpetrators and victims of such crimes. The commission can propose means of arbitration and reconciliation and clarify the truth. It is endowed with enforcement powers to induce the appearance of witnesses and the submission of documents, and the power to review final judgments rendered in cases of "assassination and political processes" with a view to taking the necessary decisions for the reconciliation process in Burundi. The commission has no power to grant amnesty but can determine the "political crimes" in respect of which an amnesty law can be adopted.

27. The commission is to be composed of 25 members, all of whom must be of Burundian nationality, and otherwise qualified. The procedure before the commission is contentious, and has a quasi-judicial nature: the "plaintiff" presents his case; the person suspected of having committed the crime has the right of reply; witnesses are heard; and the "respondent" or "defendant" has the final word.

28. The process of consultation which preceded the adoption of the law on the establishment of the truth and reconciliation commission was limited, at best. The mission wishes to stress that a broad, comprehensive and fully inclusive process of consultations with all sectors, groups, grass-roots organizations, political actors and individual citizens is a precondition for the respect and credibility of any truth and reconciliation commission, without which there is little likelihood that its findings will be acceptable to the society at large. The mission believes that the deep-seated suspicions and serious doubts expressed by many of its interlocutors about the credibility of the national truth and reconciliation commission and the acceptability of its findings are largely attributed to the lack of a transparent and genuine consultative process and the all-Burundian composition of the truth and reconciliation commission.

29. In an attempt to delineate the respective competences of the national truth and reconciliation commission and the international judicial commission of inquiry, the Arusha Agreement empowers the former to "bring to light and establish the truth regarding the serious acts of violence committed during the cyclical conflicts which cast a tragic shadow over Burundi". It added that the truth and reconciliation commission "*shall not be competent to classify acts of genocide, crimes against humanity and war crimes*". (emphasis added)

30. In the view of the mission, the delineation between the two commissions is blurred. It is equally of the view that, if the crimes falling within the jurisdiction of the truth and reconciliation commission were "serious acts of violence committed during the cyclical conflicts" and of such a nature as to cast a "tragic shadow" over Burundi, it could not be seriously argued that they were anything but crimes of genocide, crimes against humanity and war crimes. Despite, therefore, the limitations put on the powers of the truth and reconciliation commission to

pronounce itself on crimes of genocide, crimes against humanity and war crimes, its temporal and subject-matter jurisdiction, including its powers of investigation, are both legally and practically identical to those of the international judicial commission.

31. Their largely overlapping mandates and the practical difficulties ensuing from their concurrent or sequential operation, including in particular a potential risk of contradictory findings, led the mission to consider the advisability of combining elements of both commissions and creating, instead, a single truth commission of mixed composition.

VI. Implications of "provisional immunity", its scope and legal validity before the national and international commissions, and before the Burundian national courts

32. Amnesty provisions are scattered throughout the Arusha Agreement and its different protocols, the 2003 Pretoria Protocol on Outstanding Political, Defence and Security Power-Sharing Issues, and the Law on Provisional Immunity from Prosecution of Political Leaders Returning from Exile. Protocol II, article 22, paragraph 2 (c), provides that the National Assembly shall adopt "such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes committed prior to the signature of the Agreement". Article 26, paragraph 1 (l) of protocol III provides:

> Amnesty shall be granted to all combatants of the political parties and movements for crimes committed as a result of their involvement in the conflict, *but not for acts of genocide, crimes against humanity or war crimes*, or for their participation in coups d'état. (emphasis added)

The Pretoria Protocol extends the scope of the amnesty to all leaders and combatants of CNDD-FDD, and the security forces of the Government of Burundi (article 2). Though referred to as "temporary immunity", its duration in time is not explicitly limited.

33. The amnesty granted under the Law on Provisional Immunity from Prosecution of Political Leaders Returning from Exile is limited in time and in personal and material scope. The "immunity" from prosecution covers crimes committed since 10 July 1962 and until the promulgation of the Law. Its "beneficiaries" are political leaders or members of the political parties signatories of the Arusha Agreement who returned from exile to participate in the transitional institutions. During the period of its validity, that is, the duration of the Transitional Government, no political leader could be arrested, indicted or prosecuted for political crimes committed during the period covered by the amnesty. Beyond the transitional period, however, all those leaders and members of political parties are, in theory, prosecutable. The material (subject-matter) scope of the "provisional immunity" extends to politically motivated crimes — although those crimes remained largely undefined — from which genocide, crimes against humanity and war crimes were explicitly excluded.

34. While the validity of the "provisional immunity" beyond the transitional period remains to be seen, for the reasons elaborated below, it is unlikely to affect

the proceedings before the truth and reconciliation commission or the international judicial commission or, for that matter, the trial process before the national courts.

35. Although, in principle, proceedings before a truth and reconciliation commission, as a non-judicial accountability mechanism, should not give rise to a plea of amnesty, the Law on the National Truth and Reconciliation Commission expressly provides that no person can use his position, his privileges and immunities, any amnesty granted or a statute of limitation, among others, as a reason for refusing to appear before the commission.

36. Similarly, amnesty would not be a bar to investigation before the international judicial commission of inquiry because of the limited material scope of the amnesty, and the legal basis of the commission. Since it is limited to politically motivated crimes, to the exclusion of the crimes of genocide, crimes against humanity and war crimes, the "provisional immunity" cannot be a bar to investigation into any of those crimes. Furthermore, if established by a Security Council resolution, the international commission would be a United Nations subsidiary body and as such would not be affected by a national legislation measure, including amnesty.

37. The question of the validity of the provisional immunity before the national courts of Burundi is at present largely theoretical. Not only is the capacity to prosecute crimes of such complexity virtually non-existent, but their competence to do so under the Law on the Punishment of Genocide, Crimes against Humanity and War Crimes is in doubt. Article 33 of the Law entrusts the power to investigate the crime of genocide, crimes against humanity and war crimes committed since 1962 until the promulgation of the Law to the international judicial commission, and the power to prosecute such crimes to the international tribunal. While the national courts remain technically competent, it was clearly the intention of the legislator to entrust the prosecution of past crimes to the international tribunal.[11]

VII. Implementation of the legal reforms and the capacity of the Burundian administration of justice

A. Legal reforms

38. In accordance with its mandate, the mission assessed the progress made towards implementation of the judicial reforms provided for in the Arusha Agreement and the capacity of the Burundian judicial system to bring to trial those responsible for the crimes of genocide, crimes against humanity and war crimes in an impartial, fair and effective manner.

[11] Article 33 of the Law provides:

> "... the investigation and characterization of acts of genocide, war crimes and other crimes against humanity committed in Burundi from 1 July 1962 until the promulgation of the present Act shall be entrusted to the International Judicial Commission of Inquiry.
>
> Should the report of the International Judicial Commission of Inquiry establish that acts of genocide, war crimes and other crimes against humanity have occurred, the Government shall request that, in addition to the competent national judicial bodies, the Security Council of the United Nations should establish an international criminal tribunal to prosecute and punish those responsible."

39. The legislative, judicial and institutional reforms provided for in the Arusha Agreement[12] include the following:

(a) Promulgation of legislation to suppress and punish the crimes of genocide, war crimes and other crimes against humanity;

(b) Establishment of a national observatory for the prevention and eradication of genocide, war crimes and other crimes against humanity;

(c) Reform of the judicial machinery at all levels, inter alia, with a view to correcting ethnic and gender imbalances where they exist;

(d) Reform of the Judicial Service Commission, as the highest disciplinary body of the magistracy, so as to ensure its independence and that of the judicial system as a whole;

(e) Amendments of the Criminal Code, Code of Criminal Procedure, Civil Code, and other laws as may be necessary;

(f) Organization of a judicial training programme, inter alia, through the establishment of a national school for the magistracy;

(g) Promotion of gender and ethnic balance in the Burundian judicial sector through, inter alia, recruitment and appointment, establishing of training colleges for employees of the judicial system and improving the status and internal promotion procedures for magistrates;

(h) Taking measures to combat corruption in all its aspects, including enforcing legislation against corruption, establishing oversight bodies and improving conditions of employment in the judicial sector;

(i) Provision of the necessary resources to the judicial sector so as to enable it to discharge its responsibilities impartially and independently.

40. Of particular importance is the provision included in article 17, paragraph 10, of protocol II, which encourages international cooperation in improving and reforming the legal system: "Foreign jurists, including former Burundian nationals living outside the country shall be requested to assist in the reform of the judicial system. The Transitional Government may appoint any such persons to judicial positions so as to promote confidence in the judiciary." In recommending the establishment of a judicial accountability mechanism to prosecute those responsible for the crimes committed, the mission took note of this provision as an expression of the Government's willingness to introduce foreign jurists into its national court system.

B. Implementation of the legal reforms

41. In implementation of the legislative reforms mandated by the Arusha Agreement, the Government of Burundi has promulgated a number of laws, notably the following:

(a) **Law No. 004 of 8 May 2003 on the Suppression of the Crime of Genocide, Crimes against Humanity and War Crimes** (Loi portant répression du crime de génocide, des crimes contre l'humanité et des crimes de guerre). The Law

[12] Protocol I, articles 6 and 7, para. 18, and protocol II, article 17.

establishes the crimes of genocide, crimes against humanity and war crimes but entrusts the international commission of inquiry and the international tribunal for Burundi, respectively, with their investigation and prosecution.

(b) **Law No. 1/014 of 22 September 2003 on the Establishment of a National Observatory for the Prevention and Eradication of the Crime of Genocide, War Crimes and Crimes against Humanity** (Loi portant missions, composition, organisation et fonctionnement de l'Observatoire national pour la prévention et l'éradication du génocide, des crimes de guerre, des autres crimes contre l'humanité et de l'exclusion). The National Observatory was conceived as an early warning mechanism and an oversight body of national processes likely to lead to inter-ethnic violence with a view to preventing the recurrence of genocide, war crimes and crimes against humanity, and combating impunity. The 45 members of the National Observatory, however, have not yet been appointed.

(c) **Law No. 1/015 of 22 September 2003 Attributing Criminal Jurisdiction to the High Courts** (Loi portant attribution de compétence répressive aux Tribunaux de grande instance en matière criminelle). The Law decentralized the criminal jurisdiction of the Appeals Courts and empowered the High Courts (*Tribunaux de grande instance*) to sit, as a first instance, in criminal cases punishable by life imprisonment or by capital punishment. The devolution of criminal jurisdiction from the three Appeals Courts (sitting in Bujumbura, Gitega and Ngozi) to the 17 High Courts had the effect of significantly reducing the case load of the Appeals Courts, and effectively introducing the right of appeal. It provided also for an opportunity to correct the ethnic imbalance in the High Courts through recruitment and promotion, as provided for in the Arusha Agreement. Following the promulgation of the Law, 70 Hutu judges from the Magistrates' Courts (*Tribunaux de résidence*) were promoted to the High Courts.

(d) **Law No. 007 of 30 June 2003 regarding the Organizational Structure and Functions of the Judicial Service Commission** (Loi portant organisation et fonctionnement du Conseil supérieur de la magistrature). Under the Transitional Constitution, the Judicial Service Commission oversees the administration of justice, guarantees the independence of the judiciary, and serves as the highest disciplinary authority. The 17 members of the Commission, however, have not yet been appointed.

42. The implementation of the legal reforms has been partial and delayed. Judicial reforms were for the most part considered effectuated with the adoption of the law, but little regard was paid to the modalities of its implementation. In many ways, therefore, it was an exercise in legislation. With the exception of the law attributing criminal jurisdiction to the High Courts and the collective promotion of Hutu judges which ensued, few legal or institutional reforms have been effectively implemented. Where they were, their impact on the capacity of the Burundian judicial system and its administration of justice to prosecute impartially and independently has been limited.

C. State of the judiciary

43. In its assessment, however inexhaustive, of the state of the Burundian judiciary and the capacity of the administration of justice to investigate and prosecute those responsible for genocide, crimes against humanity and war crimes, the mission focused on the following indicators: (1) the availability of resources

(financial, material and human); (2) the state of the magistracy, its independence and ethnic composition, the qualification of the judges, and conditions of employment; and (3) the investigatory and prosecutorial capacity.

1. Availability of resources

44. In the justice sector, financial, material and logistical resources are practically non-existent, and the infrastructure is minimal. The *Palais de justice* in Bujumbura disposes of two court rooms, of which one serves in rotation the Appeals Court and the Supreme Court, and the other serves the High Court. The most elementary office equipment — paper, furniture and typewriters, and means of transportation are lacking. The laws are published in the Official Bulletin after long delays and in French only (while Kirundi is by far the most commonly spoken language in Burundi). They are disseminated in few copies to the various Court libraries, but are not otherwise available in the public domain. There is no systematic publication of judgements; the last was published eight years ago.

2. State of the magistracy

45. Human resources, throughout the justice sector, are likewise lacking, both in numbers and adequate qualifications. At the heart of the problem are the notoriously low salaries which are conducive to corruption. Low remuneration is also the reason for the brain drain and the massive departure of judges from the judiciary to other lucrative occupations, and notably non-governmental organizations, United Nations agencies and private practice.

46. In a system where judges are few, poorly remunerated and ill-trained, fewer still possess the required legal qualifications. In the absence of a National School for the Magistracy, the field office of the United Nations High Commissioner for Human Rights in Burundi has been engaged for over a decade in strengthening the judicial system through a programme of judicial assistance (providing international lawyers to support local prosecutors and defence counsel) and organizing seminars and training courses for members of the police force, civil and military judges, prosecutors, registry staff and members of the prison authorities.

47. The poorly trained, overburdened and underresourced judiciary is also prone to the political interference of the Executive and the Legislature. Notwithstanding the constitutional provisions on the independence of the judiciary, its perception among the population at large is that of a partial, ethnically biased and politically dependent judiciary.

48. The lack of independence of the judiciary is compounded by the fact that the composition of the justice sector is still Tutsi-dominated, while Hutu members of the legal profession account for a negligible minority. The mission recognizes, however, that efforts are being made to correct the ethnic imbalance. Hutu judges currently account for the majority of judges in the Magistrates' Courts (*Tribunaux de résidence*), where a degree in law is not a necessary requirement for appointment as a judge. With the promotion of 70 Magistrates' Court judges to the High Courts, the ethnic composition in the latter has shifted. Several more years would be required, however, to train the newly appointed judges. The Supreme Court and the Appeals Court are still Tutsi-dominated and, in the newly created Constitutional

Court, four out of seven judges are Hutu.[13] The Tutsi-dominated composition of the Burundi court system, particularly in the higher instances, is due in part to the unequal access to legal education. It is due in large part, however, to the fact that in the 1972 massacres many of the Hutu intellectuals, scholars, students, high-school pupils and members of the legal profession were particularly targeted. With the wiping-out of a generation of Hutu lawyers, there was little inclination among next-generation Hutu to engage in the study of law.

49. In a largely weak and dysfunctional administration of justice, legal proceedings against those responsible for mass killing and other serious violations of human rights and international humanitarian law are either not instituted or are too lengthy, and in most cases in flagrant violation of the most elementary rights of the accused. The Burundian justice system is in many ways a selective justice, or "*justice à deux vitesses*". While no one has ever been brought to justice for the killing of at least 80,000 Hutu civilians in 1972, large-scale arrests of Hutu civilians were carried out diligently in the aftermath of the 1993 coup d'état and the massacres that followed.

3. Investigatory and prosecutorial capacity

50. The flaws which characterize the judiciary are endemic to the entire justice sector, including in particular, the investigative police (*Police judiciaire des parquets*) responsible for the conduct of criminal investigation. The lack of financial and human resources (only 142 police officers serve in the *Police judiciaire*), office equipment and means of transportation and logistics seriously hampers the conduct of criminal investigation — which relies almost exclusively on testimonial evidence — the appearance of witnesses in court and the execution of judgements. As in all organs of the justice system, investigators in the *Police judiciaire* lack adequate qualifications and training.

51. As part of its overall assessment of the administration of justice, the mission visited the Mpimba prison, where it witnessed the severe overcrowding and harsh conditions of detention. With over 2,500 detainees in a prison whose maximum capacity is 800, more than 1,000 of whom are awaiting trial, the Mpimba prison, the highest-security prison in Burundi, has no capacity to absorb any more detainees.

52. For all these reasons, the Burundian justice system has failed to command the respect and trust of the population. Many Burundians have lost confidence in the judiciary and its ability to bring justice and afford basic protection. The mission is convinced that its capacity to deal with complex cases involving genocide, crimes against humanity and war crimes is virtually non-existent.

VIII. Recommendations

53. In considering the modalities for establishing an accountability mechanism for Burundi to clarify the truth, investigate the crimes and bring to justice those responsible, the mission has taken into account the Arusha Agreement, the needs

[13] Attempts were also made to correct the gender imbalance. With more women joining the legal profession, there are now women represented in all courts, including the Appeals Court, the Supreme Court, where four of the nine judges are women, and the Constitutional Court, where two of the seven judges, including the President, are women.

and expectations of the Burundians, the capacity of the Burundian administration of justice, established United Nations principles and practices, and the practicality and feasibility of any proposed solution. It accordingly recommends a two-phase approach: the establishment of a non-judicial accountability mechanism in the form of a truth commission, and the establishment of a judicial accountability mechanism in the form of a special chamber within the court system of Burundi.

54. The mission recognizes that its proposed twin mechanism deviates from the letter — though not the spirit — of the Arusha Agreement. It is at the same time convinced that the establishment of the two commissions in parallel, as envisaged under the Arusha Agreement, would create the almost certain risk of overlapping jurisdictions, contradictory findings, waste of resources and, more importantly perhaps, marginalize the national truth and reconciliation commission.

A. A national truth commission of mixed composition

55. In devising the modalities of a non-judicial accountability mechanism, the mission took account of the promulgation of the Law on the Composition, Organization and Functions of the National Truth and Reconciliation Commission, and the need to avoid the establishment and operation of two almost identical commissions, one national and one international. It has thus opted for a single truth commission combining elements of both commissions. The legal basis of the proposed truth commission would be a national law, which may be either a modification of the present law or a newly promulgated law. The commission would in this sense remain national in character; its composition, however, would be mixed to include both international and national members, the former constituting the majority. A truth commission with a substantial international component would enhance objectivity, impartiality and credibility, and at the same time promote a sense of national "ownership" through participation of Burundians in the process of clarifying the historical truth and pursuing national reconciliation. The modalities of the proposed truth commission would be based on the following principles:

(a) The legal framework for the establishment of the truth commission would consist of a national law and an agreement between the United Nations and the Government of Burundi. The national law would establish the subject-matter, temporal and personal jurisdiction of the commission, its powers and competences and its relationship with the special chamber. The agreement between the United Nations and the Government would establish the terms and conditions for United Nations cooperation in the establishment and operation of the commission. The law shall be annexed to the agreement and form an integral part thereof.

(b) In accordance with the Arusha Agreement, the mandate of the commission would be to establish the facts and determine the causes and nature of the conflict in Burundi, classify the crimes committed since its independence in 1962, and identify those responsible for the crimes of genocide, crimes against humanity and war crimes committed in the various cycles of conflict.

(c) In proposing a mixed composition of international and national commissioners, the mission is acutely aware of the deep ethnic divisions within Burundian society, and the mutual distrust between the two ethnic groups. It thus proposes that in the choice of the Burundian commissioners particular care should be taken to ensure that the national commissioners should be known for their

integrity, objectivity and impartiality and recognized in Burundi as transcending the ethnic divide.

(d) The relationship between the truth commission and the special chamber would depend on the sequence of their establishment, and the modalities of their cooperation would be accordingly determined in the founding instrument of each mechanism. It is expected, however, that because of its limited requirements in human and financial resources the truth commission will be established first. Expeditious establishment of the commission will ensure that, by the time a special chamber is established, the results of the investigations carried out by the commission could be shared with the Prosecutor of the special chamber. It is quite likely however that, for a while at least, the two mechanisms will operate simultaneously.

(e) To the extent of their concurrent operation, the modalities for their cooperation could include a referral of cases from the commission to the chamber, sharing of information and evidentiary material and, where appropriate, sharing of services, knowledge and expertise. The mission recalls that, in the case of Sierra Leone and Timor-Leste, the concurrent operation of a truth and reconciliation commission and a national or international court gave rise to a similar need to determine the relationship between the two United Nations-assisted judicial and non-judicial accountability mechanisms.

56. On the basis of previous experience, and notably the United Nations-assisted Truth and Reconciliation Commission in Sierra Leone, the mission recommends a more streamlined structure and composition as the basis for establishing the financial, logistical and personnel requirements of the truth commission for Burundi, as follows:

(a) The mission considers the number of 25 commissioners provided for in the Law on the National Truth and Reconciliation Commission to be unnecessarily cumbersome. It recommends, instead, that the proposed truth commission be composed of five commissioners, of whom three would be internationals and two nationals.

(b) An executive secretary should be responsible for the administration of the commission, and administrative support staff.

(c) The core activities of the commission would be carried out by two units, namely, an investigative unit responsible for investigating the crimes and identifying those responsible, and a research unit responsible for establishing the causes and facts of the conflict and the nature of the crimes committed in the different cycles of violence. The composition of the investigative and research units would be mixed, with a substantial international component. They will include, respectively, investigators, forensic experts, historians, political scientists and other experts, as appropriate. While the investigation conducted by the truth commission would not be a criminal or judicial investigation, investigators would conduct their information-gathering activities in full respect of the rights of witnesses and due process of law.

(d) The commission would establish its main office in Bujumbura, and a number of regional offices throughout the country. It would be provided with furniture, office equipment and maintenance supplies, services and utilities, means of transportation and communication.

(e) The Government of Burundi is responsible under international law for the safety and security of United Nations personnel and other international personnel of the commission. Notwithstanding its expression of willingness to do so, the capacity of the Government to fulfil its international obligations is limited. The commission would, therefore, establish a security office responsible for the protection of material, personnel and facilities, in liaison with local and government authorities. While precise security measures will have to be determined at the time of the establishment of the commission, it is envisaged that internal security of the premises of the commission would be provided by security guards contracted by or provided to the commission, and external security would be provided by the Government. A protective detail would be required for the commissioners, and escort would be provided for investigators travelling on mission throughout the country. In the circumstances, adequate protection should also be provided for witnesses. Depending on the security requirements at the time of their establishment, the possibility of extending the mandate of the United Nations Operation in Burundi to provide security for the commission and the special chamber may be considered.

(f) While more detailed cost estimates would be prepared at the time of the establishment of the truth commission, the mission notes that the financial cost of a similar structure for the Truth and Reconciliation Commission for Sierra Leone was in the amount of $6 million.

B. A special chamber in the court system of Burundi

57. In considering a judicial accountability mechanism for Burundi, the mission has examined the variety of United Nations-based or assisted tribunals, their legal status, financial mechanism, efficiency and cost-effectiveness and the legacy they left behind, in the light of experience gained in a decade-long United Nations engagement in promoting justice and the rule of law.

58. The two ad hoc international tribunals for the former Yugoslavia and Rwanda, the first international criminal tribunals to be established by a Security Council resolution under Chapter VII of the Charter of the United Nations, are subsidiary bodies of the Security Council, financed in their entirety through assessed contributions. The costs entailed in their operation since their establishment in 1993 and 1994, and their lengthy procedures and location outside the country where the crimes were committed were among the factors which persuaded the mission not to recommend a similar ad hoc international tribunal for Burundi.

59. An international tribunal of a different kind is the Special Court for Sierra Leone established by agreement between the United Nations and the Government of Sierra Leone, and initially financed by voluntary contributions. Unlike the ad hoc tribunals for the former Yugoslavia and Rwanda, the Special Court is located in the country where the crimes were committed, but does not form part of the Sierra Leone court system. A financial shortfall in its second year of operation led to a request for a limited subvention, which was approved by the General Assembly in resolution 58/284 of 8 April 2004.

60. In deciding to recommend a special chamber within the court system of Burundi, the mission has drawn upon the model of the War Crimes Chamber now being established in the State Court of Bosnia and Herzegovina. It has thus opted for a judicial accountability mechanism not only located in the country, but forming

part of the Burundian court system (a "court within a court"), with a view to strengthening the judicial sector in material and human resources, leaving behind a legacy of trained judges, prosecutors, defence counsel and experienced court managers.

61. The special chamber established in the court system of Burundi as a "court within a court" would have the competence to prosecute those bearing the greatest responsibility for the crime of genocide, crimes against humanity and war crimes committed in Burundi. Its temporal jurisdiction would be limited to specific phases of the conflict and would include, as a minimum, the events between 1972 and 1993, inclusive.

62. The legal basis for the establishment of the special chamber and the applicable law governing its operation will be Burundian law, with the necessary modifications introduced to ensure procedural guarantees of fair trial and due process of law. For the United Nations to cooperate in the establishment of the special chamber, however, its founding instrument will have to exclude the death penalty from the possible list of punishments imposed, and declare any amnesty given to genocide, crimes against humanity and war crimes invalid before the chamber.

63. An agreement would be concluded between the United Nations and the Government to determine the terms and conditions of United Nations cooperation in the establishment and operation of the special chamber, to which the law establishing the special chamber would be annexed.

64. The special chamber would consist of a trial panel (or panels) and an appellate penal, composed, respectively, of three and five judges.

65. The composition of the special chamber would be mixed, with a majority of international judges and an international prosecutor and a registrar. The prosecutor's office and court management would include a substantial international component.

66. Given the available infrastructure in the *Palais de justice* in Bujumbura, additional premises will have to be provided by the Government, and refurbished, if necessary, by the special chamber.

C. Financial mechanism

67. The truth commission and the special chamber will be established as national law entities. As such, they will not be United Nations bodies, and would not normally be financed through assessed contributions. In the circumstances of Burundi, however, the establishment of any accountability mechanism will have to rely in its entirety on international funding, whether in the form of voluntary contributions or, in part at least, through assessed contributions. While it is, at this stage, premature to assess the financial and other requirements of the truth commission and the special chamber, the mission wishes to stress that a decision to establish either or both mechanisms should be taken in full consideration of the financial costs involved and the need to ensure a viable and sustained operation. In this connection it wishes to reiterate the plea made by the Secretary-General in his report of 23 August 2004 on the rule of law and transitional justice in conflict and post-conflict societies:

> ... any future financial mechanism must provide the assured and continuous source of funding that is needed to appoint officials and staff, contract

services, purchase equipment and support investigations, prosecutions and trials and do so expeditiously. Resort, therefore, to assessed contributions remains necessary in these cases. The operation of judicial bodies cannot be left entirely to the vagaries of voluntary financing. (S/2004/616, para. 43)

IX. Observations

68. Having been mandated to consider the advisability and feasibility of establishing an international judicial commission of inquiry at the request of the Government of Burundi, the mission is convinced of the necessity of establishing a commission, though not necessarily in the shape and form requested. In an integrated and "holistic approach" to establishing justice and the rule of law in post-conflict Burundi, the mission proposes the establishment of a truth-telling mechanism to clarify the truth objectively, impartially and in a credible manner, and the establishment of a special chamber in the court system of Burundi to enhance the capacity of the judicial sector, and leave behind a legacy of international standards of justice and a generation of trained judges, prosecutors, defence counsel and court managers. The establishment of the twin accountability mechanism should thus be placed within the general context of the overall judicial reform and capacity-building in Burundi, and be pursued in complementarity with any such justice and rule of law initiatives.

69. The presence of the United Nations Operation in Burundi (ONUB) affords a unique opportunity for the United Nations to engage in restoring the peace, building national reconciliation and achieving justice. It is within this context also that both ONUB and the Office of the United Nations High Commissioner for Human Rights should engage, within their respective mandates under Security Council resolution 1545 (2004), in the establishment and operation of the international truth commission and strengthening the capacity of the Burundian judicial sector.

70. The Security Council has repeatedly reaffirmed the vital importance of the Burundian parties themselves taking ownership of the process to address the devastating impact of impunity. On a number of occasions, it has pledged the willingness and readiness of the international community to assist in efforts to build up the Burundian capacity for promoting respect for human rights standards and the rule of law and put an end to impunity (S/PRST/2003/4). In its report, the Security Council mission to Central Africa in June 2003 recommended that the Security Council assist Burundi in putting an end to impunity and that it consider carefully the Government's request for the establishment of the international judicial commission of inquiry as provided for in the Arusha Agreement (S/2003/653, para. 44).

71. In recommending that an agreement be concluded between the United Nations and the Government of Burundi on the terms of United Nations cooperation in the establishment and operation of both accountability mechanisms, it is the intention of the mission to ensure that the Government's responsibility to cooperate — including in surrendering indictees at the request of the special chamber — be internationally engaged, and that its political will to eradicate impunity and bring to justice those responsible be tested.

72. In the light of the Council's declarations and statements of intent, it is the view of the mission that the United Nations can no longer engage in establishing

commissions of inquiry and disregard their recommendations without seriously undermining the credibility of the Organization in promoting justice and the rule of law. The mission is, therefore, of the view that a comprehensive approach to the pursuit of truth and justice in Burundi is now necessary.

73. Unlike the Arusha Agreement which foresees two parallel tracks, the national and the international, the mission proposes a cooperative effort in which the international community lends its assistance and the Government of Burundi remains ultimately responsible for the eradication of impunity and restoring the rule of law.

74. The present report, submitted in response to the Council's request to examine the advisability and feasibility of establishing an international judicial commission of inquiry for Burundi, is the first in a two-stage process of establishing judicial and non-judicial accountability mechanisms in Burundi. If this is acceptable to the Council, it should mandate the Secretary-General to engage in negotiation with the Government of Burundi on the practical implementation of the proposal to establish the truth commission and the special chamber.

75. At the second stage and in parallel to the negotiation process with the Government, a broad-based, genuine and transparent process of consultation would be conducted with a range of national actors and civil society at large, to ensure that, within the general legal framework for the establishment of judicial and non-judicial accountability mechanisms acceptable to the United Nations and the Government, the views and wishes of the people of Burundi are taken into account.